

110TH CONGRESS  
2D SESSION

# H. R. 5679

To amend the Real Estate Settlement Procedures Act of 1974 to require mortgagees for mortgages in default to engage in reasonable loss mitigation activities.

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## IN THE HOUSE OF REPRESENTATIVES

APRIL 2, 2008

Ms. WATERS introduced the following bill; which was referred to the  
Committee on Financial Services

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## A BILL

To amend the Real Estate Settlement Procedures Act of 1974 to require mortgagees for mortgages in default to engage in reasonable loss mitigation activities.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Foreclosure Prevention  
5       and Sound Mortgage Servicing Act of 2008”.

6       **SEC. 2. DUTY TO ENGAGE IN LOSS MITIGATION.**

7       (a) DUTY.—The Real Estate Settlement Procedures  
8       Act of 1974 is amended by inserting after section 6 (12  
9       U.S.C. 2605) the following new section:

1 **“SEC. 6A. DUTY TO ENGAGE IN LOSS MITIGATION.**

2 “(a) DUTY FOR COVERED FEDERALLY RELATED  
3 MORTGAGE LOANS.—Upon default of any federally re-  
4 lated mortgage loan that is secured by a lien on the prin-  
5 cipal residence of the borrower or mortgagor, the mort-  
6 gagee shall engage in reasonable loss mitigation activities  
7 that provide for—

8 “(1) the long-term affordability of the loan; and

9 “(2) the maximum retention of home equity.

10 “(b) NO FORECLOSURE WITHOUT LOSS MITIGA-  
11 TION.—No foreclosure of any covered federally related  
12 mortgage loan shall be initiated if the mortgagee or  
13 servicer has at any time failed to comply with the require-  
14 ments of this section with respect to such loan.

15 “(c) LOSS MITIGATION ACTIVITIES.—

16 “(1) IN GENERAL.—For purposes of this sec-  
17 tion, loss mitigation activities shall include both pri-  
18 ority loss mitigation activities and secondary loss  
19 mitigation activities. In complying with subsection  
20 (a), the mortgagee or servicer shall pursue priority  
21 loss mitigation activities before considering sec-  
22 ondary loss mitigation activities. If any loss mitiga-  
23 tion activity is taken, including any priority or sec-  
24 ondary loss mitigation activities, the mortgagee or  
25 servicer shall provide written notice of such activity

1 to the borrower or mortgagor by mail not later than  
2 7 business days after such action is taken.

3 “(2) PRIORITY LOSS MITIGATION ACTIVITIES.—  
4 For purposes of this section, the term ‘priority loss  
5 mitigation activities’ includes, with respect to a cov-  
6 ered federally related mortgage loan, activities that  
7 preserve the borrower’s or mortgagor’s ownership in-  
8 terest in the property that is subject to the lien se-  
9 curing the loan. Priority loss mitigation activities in-  
10 clude the following activities:

11 “(A) Waiver of any late payment charge,  
12 penalty interest, or any other fees or charges,  
13 or any combination thereof.

14 “(B) Establishment of a repayment plan  
15 under which the borrower or mortgagor re-  
16 sumes regularly scheduled payments and pays  
17 additional amounts at scheduled intervals to  
18 cure the delinquency.

19 “(C) Forbearance under the loan that pro-  
20 vides for a temporary reduction in, or cessation  
21 of, monthly payments followed by a reamortiza-  
22 tion of the amounts due under loan, including  
23 arrearage, and a new schedule of repayment  
24 amounts.

1           “(D) Waiver, modification, or variation of  
2           any material term of the loan, including short-  
3           term, long-term, or life-of-loan modifications  
4           that change the interest rate, forgive the pay-  
5           ment of principal or interest, or extend the final  
6           maturity date of the loan.

7           “(E) Short refinancing of the loan con-  
8           sisting of acceptance of payment from or on be-  
9           half of the borrower or mortgagor of an amount  
10          less than the amount alleged to be due and  
11          owing under the loan, including principal, inter-  
12          est, and fees, in full satisfaction of the obliga-  
13          tion under such loan and as part of a refinance  
14          transaction in which the property is intended to  
15          remain the principal residence of the borrower  
16          or mortgagor.

17          “(3) SECONDARY LOSS MITIGATION ACTIVI-  
18          TIES.—For purposes of this section, the term ‘sec-  
19          ondary loss mitigation activities’ includes, with re-  
20          spect to a covered federally related mortgage loan,  
21          activities that avoid foreclosure but do not preserve  
22          the borrower’s or mortgagor’s ownership interest in  
23          the property that is subject to the lien securing the  
24          loan. Secondary loss mitigation activities include the  
25          following activities:

1           “(A) Short sale of the principal residence  
2           that is subject to the lien securing the loan,  
3           consisting of acceptance of payment from or on  
4           behalf of the borrower or mortgagor of an  
5           amount less than the amount alleged to be due  
6           and owing under the loan, including principal,  
7           interest, and fees, in full satisfaction of the obli-  
8           gation under such loan and as part of a sale  
9           transaction in which the property is not in-  
10          tended to remain the principal residence of the  
11          borrower or mortgagor.

12           “(B) Assumption of the borrower’s obliga-  
13          tions under the loan by a third-party.

14           “(C) Cancellation or postponement of a  
15          foreclosure sale to allow the borrower or mort-  
16          gagor additional time to sell the property.

17           “(D) Acquisition of the property by the  
18          mortgagee or servicer by deed in lieu of fore-  
19          closure.

20          “(d) AFFORDABLE PAYMENTS.—

21           “(1) IN GENERAL.—The affordability of any  
22          scheduled payments due from the borrower or mort-  
23          gagor pursuant to loss mitigation activities shall be  
24          taken into consideration in determining whether a  
25          mortgagee has engaged, for purposes of subsection

1 (a)(1), in reasonable loss mitigation activities that  
2 provide for long-term affordability of the loan. Pay-  
3 ments under a loan shall be considered to be afford-  
4 able for a borrower or mortgagor for purposes of  
5 this subsection if such payments result in a debt-to-  
6 income ratio or residual income of the borrower or  
7 mortgagor in an amount permitted under section  
8 36.4337 of title 38, Code of Federal Regulations.

9 “(2) INCOME USED IN DETERMINING AFFORD-  
10 ABILITY.—In making a determination of afford-  
11 ability for purposes of this subsection, a mortgagee  
12 or servicer shall use the income information fur-  
13 nished by the borrower at the time of loan origina-  
14 tion, except that the borrower or mortgagor may  
15 elect to provide the mortgagee or servicer with cur-  
16 rent information and, if so provided, such current  
17 income information shall be used for purposes of de-  
18 termining affordability. The mortgagee or servicer  
19 shall advise the borrower or mortgagor of any right  
20 under this paragraph to provide current income in-  
21 formation. If current income information is used, all  
22 sources of income shall be verified by tax returns,  
23 payroll receipts, bank records, or other third-party  
24 verification; the best and most appropriate docu-  
25 mentation shall be used.

1           “(3) DEBT PAYMENTS USED IN DETERMINING  
2           AFFORDABILITY.—In the case of default of any cov-  
3           ered federally related mortgage loan for which the  
4           security property is subject to multiple liens—

5                   “(A) each mortgagee or servicer with re-  
6                   spect to a senior lien shall reasonably take into  
7                   account the obligations of the borrower or mort-  
8                   gagor under subordinate liens; and

9                   “(B) the mortgagee or servicer shall take  
10                  into account any other secured or unsecured ob-  
11                  ligations of the borrower or mortgagor.

12           “(4) WRITTEN NOTIFICATION OF AFFORD-  
13           ABILITY CALCULATION.—The mortgagee or servicer  
14           shall notify the borrower or mortgagor in writing of  
15           the results of the determination of affordability  
16           under this subsection and the income on which the  
17           determination was based. Such written notice shall  
18           be provided by mail not later than 7 business days  
19           after such action is taken or as part of the written  
20           notice required under subsection (c)(1), whichever is  
21           earlier.

22           “(e) REASONABLE FEE.—A mortgagee engaged in  
23           loss mitigation pursuant to this section may charge a rea-  
24           sonable fee for loss mitigation activities in addition to ac-  
25           tual administrative costs and other expenses. The Sec-

1 retary may review the fees, administrative costs, and other  
2 expenses passed on to borrowers by any mortgagee en-  
3 gaged in loss mitigation and shall exclude or reduce any  
4 costs or expenses the Secretary considers excessive or ir-  
5 relevant to loss mitigation activities.

6 “(f) NOTIFICATION OF INTEREST RATE INCREASE.—

7 In the case of any covered federally related mortgage loan  
8 that is an adjustable rate mortgage, not less than 60 days  
9 before any increase in the periodic payment due for prin-  
10 cipal or interest or in the interest rate charged under the  
11 loan, but not more than 120 days before such increase,  
12 the mortgagee or servicer shall, in addition to any notices  
13 required by the contract and other law, inform the bor-  
14 rower in writing by mail and by telephone of the date that  
15 such payment or interest rate increase will occur and of  
16 the amount of the projected monthly payment under the  
17 loan after such increase, based on the prevailing interest  
18 rate of the index used for such increase with the 30-day  
19 period ending upon such notice. The written notice shall  
20 provide the information required under this subsection in  
21 a clear and conspicuous format.

22 “(g) SUBORDINATE LIENS.—Each mortgagee with  
23 respect to a subordinate lien shall provide to mortgagees  
24 having senior liens information needed by such senior  
25 mortgagees to engage in reasonable loss mitigation as re-



1 quired by this section. Any modification of the loan under-  
2 taken as part of loss mitigation activity shall not impair  
3 the priority status of liens under the modified loan, to the  
4 extent that there are no additional funds advanced to the  
5 borrower in connection with such modification.

6 “(h) DIRECT ACCESS TO AUTHORIZED LOSS MITIGA-  
7 TION PERSONNEL.—

8 “(1) PROVISION OF CONTACT INFORMATION.—

9 The mortgagee or servicer of a covered federally re-  
10 lated mortgage loan shall provide, on each regular  
11 account statement for the loan, a toll-free or collect-  
12 call telephone number that provides the borrower  
13 with direct access to a person with the information  
14 and authority to answer questions and fully resolve  
15 issues related to loss mitigation activities for the  
16 loan.

17 “(2) PROHIBITION ON OUTSOURCING.—In car-  
18 rying out subsection (a) with respect to a covered  
19 federally related mortgage loan, any contact by or on  
20 behalf of a mortgagee or servicer with the home-  
21 owner and any processing of any loss mitigation ac-  
22 tivities shall be conducted only by agents of the  
23 mortgagee or servicer who are physically located in  
24 the United States.

1       “(i) DUTY TO REFER TO HUD-CERTIFIED HOUSING  
2 COUNSELOR.—

3               “(1) REFERRAL BY SERVICER OR MORT-  
4 GAGEE.—In the case of any payment due under a  
5 covered federally related mortgage loan that is more  
6 than 60 days late, the servicer or mortgagee shall  
7 forward to a housing counseling agency approved by  
8 the Secretary the contact information of the bor-  
9 rower.

10              “(2) EXPRESSION OF BORROWER PREF-  
11 ERENCE.—The borrower may communicate to the  
12 servicer or mortgagee a preference for a particular  
13 housing counseling agency approved by the Sec-  
14 retary—

15                   “(A) in writing at the time of closing on  
16 the loan; or

17                   “(B) in writing at any time during the  
18 term of the loan, including by conveyance of  
19 signed authorization form from the approved  
20 housing counseling agency of the borrower’s  
21 choice, which shall be transmitted by such agen-  
22 cy to the mortgagee or servicer.

23              “(3) REFERRAL RELATIONSHIP.—A mortgagee  
24 or servicer may establish a referral relationship with  
25 a housing counseling agency approved by the Sec-

1       retary, but such relationship may not be exclusive  
2       and the mortgagee or servicer may not refuse to re-  
3       spond to qualified written requests and other com-  
4       munications from another housing counseling agency  
5       approved by the Secretary or any other agent that  
6       is authorized by the borrower.

7       “(j) PROHIBITION ON WAIVER OF RIGHTS.—A mort-  
8       gagee for a covered federally related mortgage loan may  
9       not—

10               “(1) when engaging in loss mitigation activities  
11       pursuant to subsection (a), require a borrower to  
12       limit or waive the rights of such borrower to bring  
13       any claims, defenses, demands, proceedings, actions,  
14       or causes of action against the mortgagee or servicer  
15       as a condition of accepting an offer of any loss miti-  
16       gation activities, including any activities under sub-  
17       section (c); or

18               “(2) require the borrower to agree to arbitra-  
19       tion as a condition of receiving loan modification ac-  
20       tivities.

21       Any waiver or arbitration provision in a written agreement  
22       prohibited under this subsection shall be void and unen-  
23       forceable.

24       “(k) REPORTING ON LOSS MITIGATION ACTIVI-  
25       TIES.—

1           “(1) IN GENERAL.—Each mortgagee or servicer  
2           of a covered federally related mortgage loan shall re-  
3           port regularly, but not less than monthly, and com-  
4           prehensively to the Secretary of the Treasury on the  
5           extent and scope of the loss mitigation activities of  
6           the mortgagee. Each such report shall include data  
7           on loss mitigation activities disaggregated according  
8           to the categories specified in each of the subpara-  
9           graphs of paragraphs (2) and (3) of subsection (c),  
10          any loss mitigation activities not covered by such  
11          categories, the number of loans receiving loss mitiga-  
12          tion that have become performing loans, the number  
13          of loans receiving loss mitigation that have pro-  
14          ceeded to foreclosure, the total number of fore-  
15          closures initiated during the reporting period, and  
16          such other information as the Secretary determines  
17          to be relevant.

18           “(2) COMPILATION OF AGGREGATE DATA.—

19           “(A) COMMENCEMENT; SCOPE.—Beginning  
20           with data for calendar year 2009, the Federal  
21           Financial Institutions Examination Council  
22           shall compile for each year, for each primary  
23           metropolitan statistical area, metropolitan sta-  
24           tistical area, and consolidated metropolitan sta-  
25           tistical area that is not comprised of designated

1 primary metropolitan statistical areas, aggregate  
2 data by census tract for all mortgagees or  
3 servicers that are required to disclose data  
4 under this subsection. The Council shall also  
5 produce tables indicating, for each primary  
6 metropolitan statistical area, metropolitan sta-  
7 tistical area, and consolidated metropolitan sta-  
8 tistical area that is not comprised of designated  
9 primary metropolitan statistical areas, aggregate  
10 loss mitigation patterns for various categories  
11 of census tracts grouped according to  
12 location, age of housing stock, income level, and  
13 racial characteristics.

14 “(B) STAFF AND DATA PROCESSING RE-  
15 SOURCES.—The Board of Governors of the Fed-  
16 eral Reserve System shall provide staff and  
17 data processing resources to the Council to enable  
18 it to carry out this paragraph.

19 “(C) AVAILABILITY TO PUBLIC.—The data  
20 and tables required pursuant to this paragraph  
21 shall be made available to the public not later  
22 than December 31 of the year following the calendar  
23 year on which the data is based.

24 “(I) DEFINITIONS.—For purposes of this section, the  
25 following definitions shall apply:

1           “(1) ADJUSTABLE RATE MORTGAGE.—The term  
2           ‘adjustable rate mortgage’ means, with respect to a  
3           federally related mortgage loan, that the loan terms  
4           provide for the rate of interest charged under the  
5           loan to reset or adjust at least once during the term  
6           of the loan.

7           “(2) COVERED FEDERALLY RELATED MORT-  
8           GAGE LOAN.—The term ‘covered federally related  
9           mortgage loan’ means a federally related mortgage  
10          loan described in subsection (a).

11          “(3) MORTGAGEE.—The term ‘mortgagee’  
12          means, with respect to a federally related mortgage  
13          loan, the original lender under the loan and any af-  
14          filiates, agents, subsidiaries, successors, or assignees  
15          of such lender, and any subsequent purchaser, trust-  
16          ee, or transferee of the loan or credit instrument  
17          issued by such lender.

18          “(4) SERVICER.—The term ‘servicer’ has the  
19          meaning given such term in section 6(i).

20          “(m) REPORT TO CONGRESS.—Not later than the ex-  
21          piration of the 12-month period beginning upon the date  
22          of the enactment of the Foreclosure Prevention and Sound  
23          Mortgage Servicing Act of 2008, and of each consecutive  
24          12-month period thereafter, the Secretary of the Treasury  
25          and the Secretary of Housing and Urban Development

1 shall provide a report to the Congress on the extent of  
2 compliance by mortgagees and servicers with the require-  
3 ments of this section and paragraphs (4) through (7) of  
4 section 6(e).

5 “(n) APPLICABILITY.—Notwithstanding any regula-  
6 tions authorized to carry out under this section, this sec-  
7 tion shall apply with respect to defaults on covered feder-  
8 ally related mortgage loans occurring after the date of the  
9 enactment of the Foreclosure Prevention and Sound Mort-  
10 gage Servicing Act of 2008, without regard to the date  
11 on which the loan was made.”.

12 (b) DUTY OF LOAN SERVICER TO RESPOND TO BOR-  
13 ROWER INQUIRIES.—Section 6(e)(1)A) of the Real Estate  
14 Settlement Procedures Act of 1974 (12 U.S.C.  
15 2605(e)(1)(A)) is amended by striking “borrower)” and  
16 inserting “(borrower, including a housing counseling agen-  
17 cy approved by the Secretary)”.

18 (c) COMPREHENSIVE DISCLOSURE AND FAIR PROC-  
19 ESSING OF QUALIFIED WRITTEN REQUESTS.—Section  
20 6(e) of the Real Estate Settlement Procedures Act of 1974  
21 (12 U.S.C. 2605(e)) is amended by adding at the end the  
22 following new paragraphs:

23 “(4) PROVISION OF INFORMATION REGARDING  
24 MORTGAGE.—The servicer of a covered federally re-  
25 lated mortgage loan (as such term is defined in sec-

1       tion 6A(l)) shall have available at all times the fol-  
2       lowing information, which shall be provided to the  
3       borrower or borrower's agent in response to a quali-  
4       fied written request by the borrower submitted in ac-  
5       cordance with the deadlines set forth in paragraph  
6       (1)(A):

7               “(A) Whether the account relating to such  
8       loan is current, or if not, the date the account  
9       went into default.

10              “(B) The current balance due on the loan,  
11       including the amount of principal due, an  
12       itemization of all fees due, an explanation of the  
13       escrow balance, and whether there are any es-  
14       crow deficiencies or shortages.

15              “(C) A full payment history that shows, in  
16       a clear and easily understandable manner, all of  
17       the activity on the loan since the origination of  
18       the loan, including the escrow account, and the  
19       application of payments made under the loan.

20              “(D) The initial terms of the loan.

21              “(E) A copy of the original note and secu-  
22       rity instrument.

23              “(F) Identification of the owner of the  
24       mortgage note and any investors in the note.



1           “(G) Any documents that limit, explain, or  
2           modify the loss mitigation activities offered by  
3           the servicer.

4           “(H) Any other information requested by  
5           the borrower that is reasonably related to loss  
6           mitigation activities.

7           “(5) PROHIBITION OF ‘WRONG DOOR’ ACTIONS  
8           FOR QUALIFIED WRITTEN REQUESTS.—All written  
9           communications from the mortgagee or servicer of a  
10          federally related mortgage loan to the borrower shall  
11          include the address for receipt and handling of  
12          qualified written requests. Any qualified written re-  
13          quest received by the mortgagee or servicer shall be  
14          valid notwithstanding receipt at any address other  
15          than that designated by the mortgagee or servicer  
16          for receipt and handling of such requests.

17          “(6) PROHIBITION OF FEE FOR RESPONSE TO  
18          QUALIFIED WRITTEN REQUESTS.—A mortgagee or  
19          servicer for a federally related mortgage loan may  
20          not impose any fee for, or on account of, the prepa-  
21          ration and submission by such mortgagee or servicer  
22          of any response or statement required by this sub-  
23          section.

24          “(7) PROHIBITION OF FORECLOSURE PENDING  
25          DISCLOSURE.—In the case of a covered federally re-

1       lated mortgage loan (as such term is defined in sec-  
 2       tion 6A(l)), no foreclosure proceeding may be initi-  
 3       ated or continued against the borrower or the prin-  
 4       cipal residence of the borrower during any period in  
 5       which a qualified written request under this sub-  
 6       section is pending and the mortgagee or servicer has  
 7       not complied with the requirements of this sub-  
 8       section regarding the request.”.

9       (d) DAMAGES AND COSTS.—Section 6(f) of the Real  
 10      Estate Settlement Procedures Act of 1974 (12 U.S.C.  
 11      2605(f)) is amended—

12               (1) in the matter preceding paragraph (1), by  
 13      inserting “or of section 6A” after “this section”;

14               (2) in paragraphs (1)(B) and (2)(B)—

15                       (A) by striking “a pattern or practice”  
 16      each place such term appears; and

17                       (B) by striking “\$1,000” each place such  
 18      term appears and inserting “\$2,000 for each  
 19      violation”;

20               (3) in paragraph (2)(B)(i), by striking  
 21      “\$500,000” and inserting “\$1,000,000”.

22      **SEC. 3. CONFORMING AMENDMENT.**

23      Section 17 of the Real Estate Settlement Procedures  
 24      Act of 1974 (12 U.S.C. 2615) is amended by striking

- 1 “Nothing” and inserting “Except as provided in sections
- 2 6(e)(7) and 6A, nothing”.

○